Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1097

E. L. FOWLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner E. L. Fowler respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on October 26, 1979.

OPINION BELOW

The panel opinion of the Court of Appeals was reported at 605 F.2d 181 (5th Cir. 1979), and is attached as Appendix "A," *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on October 26, 1979. A timely petition for rehearing and rehearing *en banc* was denied on December 14, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

I.

Did the court's instruction to the jury that "[a]fter the government has made a reasonable effort to identify and produce evidence of the cost of goods, the burden then shifts to the defendant to produce evidence of additional costs of goods sold" impermissibly shift the burden of proof onto Petitioner?

II.

Can a criminal defendant be deemed to have waived his right to counsel when he exercises prompt, reasonable efforts to obtain counsel upon being informed by the court of a pending trial date and cannot locate counsel to represent him?

III.

Does Rule 44(a) of the Federal Rules of Criminal Procedure require a court to appoint counsel when a criminal defendant cannot find counsel willing to prepare in what the court feels is a reasonable time?

IV.

Does a conflict exist among the circuits as to whether a sentence of incarceration should be vacated because a criminal defendant did not "clearly waive" his right

to counsel even though the conviction is affirmed on appeal?

V.

Did Rule 104(c) of the Federal Rules of Evidence impose a duty on the trial judge to examine Petitioner on the question of his competency as a witness out of the presence of the jury?

STATUTES INVOLVED

Rule 104(c) of the Federal Rules of Evidence:

> Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interest of justice require or, when an accused is a witness, if he so requests.

STATEMENT OF THE CASE

Petitioner E. L. Fowler was charged in the Northern District of Georgia in a five-count criminal information alleging willful failure to file income tax returns for the years 1971 through 1975. Pursuant to a motion for change of venue, the case was transferred to the Middle District of Georgia. Trial commenced on October 16, 1978. Petitioner was not represented by counsel. The jury returned a verdict of guilt as to each count the following day. Petitioner, a seventy-year-old resident of Tifton, Georgia, was sentenced to a three year period of incarceration and a four thousand dollar fine.

A panel decision of the Fifth Circuit was rendered on October 26, 1979. *Inter alia*, the opinion held that Petitioner waived his right to counsel by failure to secure

counsel prior to trial; that an instruction to the jury did not shift the burden of production of evidence onto Petitioner or comment on his right to remain silent at trial; that Petitioner could not, under the authority of *United States v. White,* 529 F.2d 1390 (8th Cir. 1976), "jail-proof himself by waiving counsel and going to trial *pro se*"; and the failure of the trial court to determine Petitioner's competency to testify outside of the presence of the jury was meritless. Petitioner's application for rehearing and rehearing *en banc* was denied without opinion on December 14, 1979. The full text of the panel opinion is attached to this petition as Appendix "A."

REASONS FOR GRANTING THE WRIT

I.

THE BURDEN SHIFTING INSTRUCTION

A taxpayer's gross income determines the duty *vel non* to file a tax return under Title 26, United States Code, Section 7203. In proving that Petitioner was a person required to file such a return, Respondent was required to prove the gross income of Petitioner in each of the tax years in question. The jury was instructed:

> After the government has made a reasonable effort to identify and produce evidence of the cost of goods sold *the burden then shifts to the defendant to produce evidence of additional costs of goods sold.* When the *defendant does then offer* further evidence of offsetting costs the burden is then on the government to persuade you members of the jury that the costs are not allowable. [Emphasis added.]

It is well settled that in a criminal prosecution, the burden of proof never shifts to a defendant. *Mullaney v.*

Wilbur, 421 U.S. 684 (1975). Petitioner recognizes that once the results of a tax investigation are put into evidence, a taxpayer-defendant, like all other defendants, "remains quiet at his peril." *Holland v. United States,* 348 U.S. 121, 138-139 (1954). It is impermissible, however, to leave a jury with the idea that it had "become the duty of the defendant to establish his innocence to obtain an acquittal." *United States v. Alston,* 551 F.2d 315 (D.C. Cir. 1976), citing *Perez v. United States,* 297 F.2d 12 (5th Cir. 1961). When the jury was instructed that Respondent had made a reasonable effort to prove the cost of goods sold, it is likely that the jury concluded that Petitioner was under a legal obligation to come forward with proof of additional cost of goods sold "and that this obligation could be satisfied only through the trial testimony of the Appellant." *United States v. Cameron,* 460 F.2d 1394, 1400 (5th Cir. 1972).

The panel opinion conflicts with this Court's directive in *Mullaney v. Wilbur, supra,* and does not pass constitutional muster. Certiorari should be granted.

II.

RIGHT TO COUNSEL

A criminal defendant cannot be deemed to have waived his right to counsel when he exercises prompt, reasonable efforts to obtain counsel upon being informed by the court of a pending trial date and cannot locate counsel to represent him.

On October 16, 1978 the instant case was called to trial. Chronologically significant dates leading up to the opening day of trial included the following:

March 3, 1978	Accusation rendered in the Northern District of Georgia

March 13, 1978	Arraignment in the Northern District of Georgia
April 26, 1978	Motion for change of venue to the Middle District of Georgia granted
July 11, 1978	Waiver of speedy trial signed by Petitioner *pro se*
September 19, 1978	Arraignment notice for Middle District of Georgia filed
October 5, 1978	*Pro se* pre-trial motions filed
October 10, 1978	Attorney Joslin contacts court with an inquiry regarding the granting of a continuance
October 12, 1978	Motion for continuance filed
October 16, 1978	Trial began

At arraignment, the trial court questioned Petitioner and ascertained that Petitioner did not have counsel. Petitioner professed an inability to "afford the one I would really like and I think I should have one." Petitioner received notification of arraignment on September 26th, approximately ten days prior to the call of the arraignment calendar. When questioned by the court as to his ability to afford privately retained counsel, Petitioner refused to answer on the grounds that do do so might tend to incriminate him. Following this Fifth Amendment invocation, the court determined that Petitioner was able to employ counsel.[1] When warned

[1]Seen in its perspective, this response to the court's direct inquiry was not unusual, owing to the assertion of Petitioner that the basis for his non-filing of a tax return was the Fifth Amendment privilege against self-incrimination. Seen in this regard, this answer was consistent with Petitioner's understanding of the law and the attempted defense which he attempted to present *pro se*.

that self-representation contained a built-in hazard, Petitioner acknowledged this fact and noted that he did not think that he could represent himself. Although provided with a copy of the accusations, Petitioner stated in court that he did not understand the nature of the charges lodged against him. Petitioner was advised that trial was to proceed the week of October 16, and that employment of counsel at the last minute was not going to be used as a delay tactic. Petitioner filed a motion for continuance on October 12, 1978. The motion requested that the trial be continued to a trial date "some time after the week beginning November 20, 1978." In his motion, Petitioner asserted that he had made reasonable efforts to locate competent legal counsel. A member of the Utah bar, Gary James Joslin, was contacted on or about October 8, two days following the arraignment. Joslin advised in an affidavit-letter that he was contacted on October 8th in regard to representing Petitioner. A local attorney, Jim Wilson, of Tifton, Georgia, was contacted by Joslin the following day and agreed to serve as "passive" counsel for Mr. Joslin. The very next day, October 10, Joslin contacted the Assistant United States Attorney and the trial court "to elicit their feelings about granting me a continuance." When told that a continuance would be granted, Joslin declined to represent Petitioner, asserting that the American Bar Association Disciplinary Rules prohibited his retention in the matter "without preparation under the circumstances." (Tr. 1:52).[2] In closing, Joslin stated . . .

> It is my opinion that it may not have been easy for Mr. Fowler to locate an attorney who appeared competent to handle this type of case, or one that he personally felt might be competent to handle this type of case.

[2]*See* ABA Disciplinary Rule 6--10(A)(2) and (5).

Trial was called at 9:30 a.m. on October 16, 1978. When told by the court that he had had adequate time to obtain counsel, Petitioner said . . .

> I don't see how you can say I have had adequate time because I have sought attorneys for my defense and I have proof enough that I have sought all during this time . . . .

When later invited to "say whatever it is you want to say," Petitioner stated to the court:

> I repeat, sir, that I am here without assistance of counsel. I do not know how to defend myself. I do not know how to operate in a courtroom. I do not know how to challenge somebody or when to say I object. My counsel does. I don't know if I am denied some place that my lawyer might see that I could give some evidence that you might try to deny. So, I don't know how to do these things. I have counsel that does know how to do these things. He is not here and could not be here and you have in your file, the file in this court, the reason he cannot be here and I have sufficient evidence from lawyers themselves that would not take this case because they didn't know how—they were not trained in this kind of case and they told me they wouldn't take it but they tried to help me get counsel and Mr. Wilson, who is an attorney in Tifton, will tell you that he helped me try to get counsel and I even had a conference in his law office with a lawyer he had found from Atlanta. So, you cannot say, it is not true that I have not sought counsel. I have been seeking counsel longer than that because—I don't understand this anyway—you have here—*I have here where the case was filed in '77 against me. And it never was tried. I don't know whether you are going through with it or not. I didn't know when, until ten days ago—now, ten days would not be enough time for me to get an attorney. It would not give me sufficient time to have him in here. So, he filed that affidavit to that effect with you.* [Emphasis added.]

This case presents a matter of precedent setting error of serious public import. Because abuse of discretion type cases must naturally rely upon a case by case analysis, citation to extrinstic case law does not afford us the benefit of a dispositive answer. See, *Unger v. Sarafite*, 376 U.S. 575 (1964). The instant record does not reflect nor echo a dispositive finding that Petitioner intelligently waived his right to counsel. To the contrary, once he was directly informed by the court that the trial would proceed without continuance, he did everything within his power to obtain counsel from the Valdosta, Georgia area, and in fact went as far as Atlanta, Georgia and Salt Lake City, Utah in his quest. As the Fifth Circuit noted in *United States v. Uptain*, 531 F.2d 1201, 1291 (5th Cir. 1976):

> A scheduled trial date should never become such an overreaching end that it results in the erosion of the defendant's right to a fair trial. If forcing a defendant to an early trial date substantially impars his ability to effectively present evidence to rebut the prosecution's case or to establish defenses, then pursuit of the goal of expeditiousness is far more detrimental to our common purposes in the criminal justice system than the delay of a few days or weeks that may be sought.

Judge Gee mentioned in the panel opinion that Petitioner was "an apparent tax protester among other things. . . ." 605 F.2d at 597. Whatever these unarticulated "other things" maybe, the record does not reflect that Petitioner was a defendant attempting to delay the trial in bad faith or in a trifling way. To the contrary, the record clearly reflects good faith attempts to find counsel *when so informed by the court* on October 6th.

If allowed to stand, the opinion below constitutes an error of precedential importance. In no case cited by Respondent, Petitioner, or the court below was a waiver of counsel deemed to have occurred under similar circumstances. In rendering its decision on this issue, the Fifth Circuit departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervising power. Certiorari should be granted.

III.

VIOLATION OF FEDERAL RULE OF PROCEDURE 44(a)

Petitioner's rights under Rule 44(a) of the Federal Rules of Criminal Procedure were violated by the failure of the trial court to appoint counsel for Petitioner. Rule 44(a) provides:

> Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the federal magistrate or the court through appeal, unless he waives such appointment.

The Advisory Committee notes state that counsel may be appointed where a defendant cannot obtain an attorney "for reasons other than financial." *United States v. White*, 529 F.2d 1390, 1393 (8th Cir. 1976); citing *Argersinger v. Hamlin*, 407 U.S. 25, 36 n.5 (1972). As analyzed by the *White* court,

> [T]his language is broad enough to permit appointment in cases where the trial court is persuaded that defendant cannot find counsel willing to prepare within what the court feels is a reasonable time. *Id.*

See also, *United States v. Curtiss*, 330 F.2d 278 (2nd Cir. 1964).

The record in the instant case does not echo a finding that Petitioner waived his right to counsel. Due to the violation of his Sixth Amendment and statutory right to counsel, his convictions should be vacated.

VI.

AFFIRMANCE OF CONVICTION, VACATION OF SENTENCE

A conflict exists among the circuits as to whether a sentence of incarceration should be vacated because a criminal defendant "did not clearly waive his right to counsel" even though the conviction is affirmed by an appellate court. The Fifth Circuit affirmed Petitioner's conviction and ruled that his sentence of three years incarceration should not be vacated. Judge Gee, speaking for the instant panel, stated:

> Fowler next urges that his sentence of three years incarceration should be vacated, basing this claim on the somewhat unusual case of *United States v. White*, 529 F.2d 1390 (8th Cir. 1976). There the appellate court vacated a jail sentence, though affirming a conviction, because "appellant did not clearly waive his right to counsel." *Id.* at 1394. Either Fowler waived his right to counsel by his actions or he did not. We have held that he did; and whatever *Scott v. Illinois*, ___ U.S. ___, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), and *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), may mean, they did not mean that a defendant can jail-proof himself by waiving counsel and going to trial *pro se*.
>
> 605 F.2d at 185.

A different result was reached by the Eighth Circuit in *United States v. White,* 529 F.2d 1390 (8th Cir. 1976). In *White,* the Eight Circuit adopted a "clear waiver" requirement of a defendant's right to counsel or imposition of a jail sentence would be precluded. The factual context of *White* is indistinguishable from the matter *sub judice.* A conflict exists between the Fifth and Eight Circuits on this issue. To insure a uniformity of decisions, this conflict justifies the granting of certiorari to review the judgment below.

V.

PETITIONER'S INCOMPETENCE AS A WITNESS

Following the close of Respondent's case-in-chief, the following colloquy transpired in the presence of the jury:

THE COURT: All right, the prosecution rests. You may proceed with your defense, Mr. Fowler. If you have any witnesses you wish to put on the stand or if you wish to take the stand and testify or if you wish to introduce any evidence of any kind, now is the time for you to do it.

MR. FOWLER: Well, of course—

THE COURT: Do you wish to testify?

MR. FOWLER: I want to state my—

THE COURT: All right, you may take the stand and testify.

THE CLERK: Hold up your right hand.

MR. FOWLER: I'm not swearing to anything.

THE CLERK: Will you affirm?

MR. FOWLER: I'm not swearing to nobody. I don't do no swearing to nobody. Nobody has accused me of a crime.

Although Petitioner refused to be sworn, he stated clearly that he "would not lie to stay out of jail. I'll tell you that. I won't lie to do that." The court then concluded:

> Let the record show that the witness was not willing to be sworn, was not willing to state that he would affirm to tell the truth and he was not willing to say anything that would indicate that he would tell the truth. So, the court decided that the witness would not be allowed to testify in that circumstance.

The privilege of a criminal defendant to testify is the converse to the privilege against self-incrimination. *United States v. Ives,* 504 F.2d 935, 936 (9th Cir. 1974), and Petitioner's privilege to testify could not be denied because he would not accede to a particular form of oath or affirmation. *United States v. Looper,* 419 F.2d 1405 (4th Cir. 1969). The record reflects that Petitioner informed the court "he would not lie" to stay out of jail. Such a statement clearly evidenced Petitioner's awareness of arousal of conscience. Failure to permit Petitioner to testify under these circumstances constituted reversible error, and conflicts with the Second Circuit's opinion in *United States v. Bentventa,* 319 F.2d 916, 942-944 (2nd Cir. 1963). In a case where due to Petitioner's *pro se* representation no other defense was presented, denial of his right to testify denied him of his only avenue to defend himself.

Further error resulted from the failure of the court to *sua sponte* make its preliminary finding of Petitioner's incompetence out of the hearing of the jury. Rule 104(a) of the Federal Rule of Evidence provides, *inter alia,* that the court shall determine preliminary questions concerning the qualification of a person to be a witness. Hearings on all matters under Rule 104(c) shall be conducted out of the hearing of the jury "where the interests

of justice require, or when an accused is a witness, if he so requests." As has been noted by Judge Weinstein:

> The goal of this rule is protection of the interests of the parties and the possibility of an alienated jury must be weighed heavy against the potential harm involved in letting them hear the evidence on the preliminary question.
>
> Weinstein's *Evidence*, paragraph 104 [09].

Examination of Petitioner in the presence of the jury ran afoul of due process protections. The opinion below is a precedent setting error of particular public importance. Certiorari should be granted, and this Court's supervisory powers should be invoked.

CONCLUSION

For the foregoing reasons, Petitioner prays that his petition for a writ of certiorari be granted.

This the fourteenth day of January, 1980.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 78-5677

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

E. L. FOWLER,
Defendant-Appellant.

Oct. 26, 1979

Defendant was convicted before the United States District Court for the Middle District of Georgia, J. Robert Elliott, Chief Judge, of willful failure to file tax returns, and he appealed. The Court of Appeals, Gee, Circuit Judge, held that: (1) defendant's failure to retain counsel between March 1978, when defendant was first arraigned, and October 12, 1978, when defendant moved for continuance, operated as a waiver of defendant's right to counsel; (2) trial court's instruction, to the effect that after Government had made reasonable effort to identify and produce evidence of cost of goods sold, the burden then shifted to defendant to produce evidence of additional costs of goods sold, did not constitute plain error so as to require reversal in absence of objection at trial; the instruction in no sense shifted to defendant any burden that he did not already have, but at worst it merely told jury where the burden of going forward rested at one point in the case; (3) trial court did not err in refusing to allow defendant to testify

after defendant refused either to swear or affirm that he would tell the truth or to submit to cross-examination; and (4) sentence of three years' incarceration imposed upon defendant would not be vacated on ground that defendant proceed pro se at trial, since defendant waived his right to counsel by his actions, and he could not jail-proof himself by waiving counsel and going to trial pro se.

Affirmed.

Frank J. Petrella, J. Roger Thompson, Atlanta, Ga., for defendant-appellant.

Richard E. Nettum, Asst. U.S. Atty., Macon, Ga., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before GODBOLD, GEE and RUBIN, Circuit Judges.

GEE, Circuit Judge:

This cause provides eloquent testimony, albeit negative, to the value of counsel's assistance to criminal defendants. Appellant Fowler, a dealer in gravestones and an apparent tax protester among other things, ceased filing federal income tax returns in 1953. A wheel that did not squeak, Fowler's practices at last attracted Revenue's notice in time to result in his indictment for willful failure to file returns for the years 1971-75. During the investigation, he cooperated with investigating revenue agents no further than by providing them with partial records for the years in question. A trial at which the government employed the "bank-deposits" mode of proof resulted in his conviction on all counts, and he appeals.

Fowler, who conducted his own defense at trial but is represented by counsel here, advances seven points of

error. Six present little of merit and may be dealt with rather briefly, but the seventh is of slight difficulty. Upon a careful consideration of all, however, we affirm his convictions. We treat his contentions in the order in which he presents them.

Fowler's first complaint is of the court's refusal of a continuance to allow him more time to retain counsel. The real substance of his contention is that putting him to trial pro se violated his right to assistance of counsel. Defendant was first arraigned in March 1978 in the Northern District of Georgia, at which occasion he was represented by temporary counsel. His motion for change of venue to the Middle District was granted in late April; and in July he waived speedy trial in order to have his case tried in Valdosta at the October term of court to be held there. Over two months passed.

In September Fowler was served notice to appear for re-arraignment on October 6. He appeared there without counsel. At that time the court carefully advised him of his right to counsel and elicited considerable testimony from him about his financial condition, Fowler refusing to answer the direct question whether he was financially able to retain counsel on the ground of possible self-incrimination. The court then found as a fact that he was financially able to do so, a ruling not attacked here, and advised Fowler that his case would be called first on the trail calendar on October 16.

On October 8, Fowler called counsel in Salt Lake City, Utah, who in turn inquired of the judge and prosecutor about getting a continuance. The judge advised counsel that no continuance would be granted. On October 12, Fowler moved pro se for a continuance, attaching Utah counsel's affidavit that he could not take on the case because of inadequate time to ready it. The case pro-

ceeded to trial as scheduled, Fowler indignantly protesting the absence of counsel and representing himself. Little authority need be added to these facts to support our ruling. The grant or denial of a continuance rests in the broad discretion of the trial judge. *United States v. Uptain,* 531 F.2d 1281 (5th Cir. 1976). We have held before this that so short a time as twenty days is, in the circumstances there presented, a reasonable time in which to retain counsel and that failure to do so operated as a waiver. *United States v. Casey,* 480 F.2d 151 (5th Cir. 1973). We have done so even when the failure resulted in a pro se defense. *See United States v. Gates,* 557 F.2d 1086 (5th Cir. 1977), and cased cited there. The right to assistance of counsel, cherished and fundamental though it be, may not be put to service as a means of delaying or trifling with the court. This contention is meritless.[1]

Fowler's next point presents the greatest difficulty among those he advances, one that arises from the somewhat unsettled and only partially charted law of presumptions in criminal cases. In a nutshell, the problem is that burden-shifting charges in such cases are of doubtful validity—a doubt compounded by two recent Supreme Court cases going in at least superficially different directions;[2] and in Fowler's case the court gave the convicting jury what sound like a burden-shifting charge.

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[1] Defendant also makes a half-formed claim that he was required to surrender his sixth amendment right to counsel in order to preserve his fifth amendment right against self-incrimination. The court's finding, not complained of here, that he was financially able to retain counsel moots this contention.

[2] *Ulster County Court v. Allen,* ___ U.S. ___, 99 S.Ct. 2213, 60 L.Ed.2d 777, handed down on June 4, 1979, upholds the New York statutory presumption that each occupant of an automobile in which firearms are present is in illegal possession of them, on the basis of the "more likely than not" standard. Two weeks later came *Sandstrom v. Montana,* ___ U.S. ___, 99 S.Ct. 2450, 61 L.

[footnote continued]

The context was this. Duty to file an income tax return results from receiving a given gross income during the accounting year concerned. Gross income of a business such as Fowler's is, generally speaking, calculated as gross receipts less cost of goods sold. In order to establish under the mode of proof it followed that Fowler had violated a duty to file, therefore, it was necessary for the government to establish, for any given period, both his gross receipts and his cost of goods sold. In the course of instructing the jury on this head, the court stated, among other matter not complained of, the following:

> To prove the defendant's gross income for the years in question it is incumbent upon the government to establish the cost of the goods sold by the defendant in each of the tax years. In this connection I charge you that it is incumbent upon the prosecution to investigate any leads which may be offered to the government by or on behalf of the defendant as to the cost of goods sold by the defendant in each of the taxable years. If these leads are

---

Ed.2d 39, striking down (on a "reasonable doubt" standard) a presumption that a person intends the ordinary consequences of his voluntary acts. Insofar as we are able to deduce a rule from these opinions, it appears to be that merely permissive instructions to the jury ("You may infer . . . .") are to be tested by the "more likely than not" standard, while so-called "mandatory presumptions" of which the jury is advised ("The law presumes . . . .") are measured by a standard of "reasonable doubt." Such deductions may well be rash, however, the opinions being further complicated by distinctions between burden of proof, burden of production, etc., dissents, special concurrences, and the like. Even so, analysis of the two opinions suggests that, in refusing to distinguish between permissive and mandatory language in this area, we may have adopted a rule more stringent than the Constitution requires. *See United States v. Chiantese,* 560 F.2d 1244, 1255 (5th Cir. 1977), (en banc), where we condemned the so-called *Mann* charge, similar to that given in *Sandstrom,* whether permissively or mandatorily phrased.

> reasonably susceptible of being checked the government must investigate into the truth of these leads or explainations. After the government has made a reasonable effort to identify and produce evidence of the cost of goods sold *the burden then shifts to the defendant to produce evidence of additional costs of goods sold.* When the defendant does then offer further evidence of off-setting costs the burden is then on the government to persuade you members of the jury that the costs are not allowable. It just depends on how the situation develops.

(emphasis added). Counsel for Fowler quite properly urges upon us the range of weighty due process considerations that attend requiring defendant to proof anything whatever in a criminal case. We conclude, however, that in the special context presented here they carry little force.

In the first place, Mr. Fowler—proceeding without counsel—voiced no objection to this portion of the charge. Counsel's absence was of Fowler's own doing, and he must take its consequences. The instruction complained of could easily have been rephrased to remove its "burden then shifts" phraseology, which was in no way integral to the thought that it sought to convey.[3] Had the objections now made for the first time to us about this terminology been made to the charging judge, it is hard for us to conceive that he would have refused to amend it. At all events, it must, being unobjected to, amount to plain error to require a reversal. Plain error is defined by this court as one "so obvious that failure to notice it

[3] As an example, for the clause commencing "the burden then shifts" could have been substituted "it is then open to the defendant, if he wishes, to produce evidence of additional costs of goods sold."

would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings,'" *United States v. Musquiz,* 445 F.2d 963, 966 (5th Cir. 1971) (quoting *United States v. Atkinson,* 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555 (1936)), to be noticed "only in exceptional circumstances to avoid a miscarriage of justice." *Easton v. United States,* 398 F.2d 485, 586 (5th Cir. 1968). This mild instruction, touching at most on the burden of production or proceeding and buried in a charge that correctly and repeatedly placed the burden of proof beyond a reasonable doubt on the government, does not constitute such an error.

In the second place, the charge as given amounts to little more than a statement of accounting fact and enjoys the additional merit of being true. Once the government has shown a spread between gross receipts and cost of goods sold, discharing its unusual task in such causes as this of making reasonable efforts against its own case by finding and adducing evidence of such costs, if the defendant wishes to narrow or destroy that spread by proving further costs it is up to him to do so. Thus, the charge in no sense shifts to the defendant any burden that he did not already have, *Siravo v. United States,* 377 F.2d 469 (1st Cir. 1967); at worst it merely tells the jury where the burden of going forward rested at one point in the case. And as given here, the words to which Fowler objects are followed in the court's next sentence by a reminder to the jury that even as to evidence of any additional costs produced by defendant, the burden of persuasion is on the government to show they are *not* allowable—not on defendant to show that they are. If the charge as given has a fault, it is in its implication that the defendant has some obligation to come forward with evidence of additional costs. This is, of course, not so, and the charge should have included some such dis-

claimer as "if he wishes" or the like. Where, however, the only consequence of his failure to do so, under the court's instructions, is that the government remains with the burden to prove both edges of the receipts-costs spread beyond a reasonable doubt, we see no harm to Fowler's substantial rights. On the above considerations, we conclude that the charge was not reversibly erroneous.

Fowler next complains that the court erred in refusing to allow him to testify after he refused either to swear or affirm that he would tell the truth or submit to cross-examination. At one point in their extended colloquy on the point, the judge offered to accept the simple statement, "I state that I will tell the truth in my testimony." Fowler was willing to do no more than laud himself in such remarks as, "I am a truthful man," and "I would not tell a lie to stay out of jail." Rule 603, Federal Rules of Evidence, is clear and simple: "Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation . . . ." No witness has the right to testify but on penalty of perjury and subject to cross-examination. This contention is frivolous.[4]

Fowler next urges that his sentence to three years incarceration should be vacated, basing this claim on the somewhat unusual case of *United States v. White,* 529 F.2d 1390 (8th Cir. 1976). There the appellate court vacated a jail sentence, though affirming a conviction, because "appellant did not clearly waive his right to

[4] Fowler also contends that the court erred in failing to determine his competency to testify out of the presence of the jury. Fed.R.Evid. 104(c). This also is meritless; no request was made that the jury be excluded, and on an earlier occasion Fowler had refused to meet with the judge in chambers, grandstanding at length for the jury on the subject.

counsel." *Id.* at 1394. Either Fowler waived his right to counsel by his actions or he did not. We have held that he did; and whatever *Scott v. Illinois,* ___ U.S. ___, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979), and *Argersinger V. Hamlin,* 407 U.S. U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), may mean, they do not mean that a defendant can jail-proof himself by waiving counsel and going to trial pro se.

Fowler's final three contensions merit little discussion. The trial court did not err in refusing to permit him to cross-examine a revenue agent about his knowledge of the outcome of an unconnected case in California. The evidence was sufficient to support his conviction, even had a motion for judgment of acquittal been made—as it was not. Nor do the trial court's asserted errors, each of which we have found either not error at all or not reversible, require a reversal when considered cumulatively rather than singly.

We cannot doubt that Fowler has derived substantial financial benefit from a long refusal to carry his share of the common burdens of citizenship. Sad to say, for he is a man no longer young, he must now respond not only in currency but in another coin: incarceration. Counsel's efforts on his behalf are commendable, but they came too late.

AFFIRMED.